

SUPREME COURT OF WISCONSIN

OFFICE OF LAWYER REGULATION

Public Reprimand with Consent

Attorney Alan S. Robertson

2011-OLR-3

First Matter

In June of 2004, Attorney Alan S. Robertson was hired as attorney for the personal representative of an estate. The grievant is an heir of the estate.

In October of 2007, a Stipulation and Order for Substitution of Attorney was signed and successor counsel replaced Robertson as attorney for the personal representative.

In November of 2007, successor counsel took possession of the estate's file from Robertson. No tax returns relative to the estate were in the file.

Successor counsel requested the tax returns from Robertson numerous times. Receiving no response to his requests, on November 14, 2008, successor counsel filed a Petition for Order to Show Cause, requesting that Robertson be ordered to show cause why he should not be compelled to produce the tax returns.

On December 8, 2008, Robertson was ordered to deliver any remaining files pertaining to the estate to successor counsel within 15 days or to show cause why he should not be punished for his failure to timely comply with successor counsel's request to turn over the files.

Robertson failed to turn over the files and on January 16, 2009, an Order for Contempt was issued. Robertson was ordered to turn over the files by January 26, 2009 or face a fine of \$50 per day for each day his contempt continued.

Robertson still failed to turn over the files and on March 5, 2009, successor counsel filed a Motion for Remedial Sanctions.

At an April 3, 2009 hearing, the court authorized the issuance of a Writ of Assistance and issued an order authorizing successor counsel and the sheriff to take action in accordance with the Writ to procure the tax files. Robertson was ordered to reimburse the estate the \$1,706.25 in

costs and fees incurred due to his failure to timely turn over the tax documents and to pay \$50.00 in fines for every day the contempt continued.

On April 17, 2009, all tax documents relating to the estate were delivered to successor counsel.

By letter dated April 20, 2009, successor counsel informed the court that Robertson had turned over the file, making the issuance of the Writ of Assistance unnecessary.

Robertson reimbursed the Estate \$1,706.25 in costs and fees on April 27, 2009.

In a letter to OLR, Robertson stated that, upon being substituted as counsel, he assembled certain portions of the estate's file and turned them over to successor counsel. He retained, however, the income tax records and fiduciary income tax returns, intending to "put them in a reasonable form." Robertson further stated that "the information and forms were not in good order" and that it was his intent to put the files in a suitable order and "walk" successor counsel through what he (Robertson) had done. Robertson admitted that his "attempts to accomplish this task languished" and that his "conduct in failing to make timely delivery of the remainder of the estate files was a breach of [his] duty and responsibility."

In a phone call with OLR, successor counsel indicated that, although the tax files were not in perfect order, the files had probably been reorganized. Successor counsel also indicated that his review of the filed revealed no evidence that Robertson had taken any funds from the estate, nor were there any other signs of irregularities in the file. Successor counsel stated that the estate was facing a complicated tax issue regarding the year to which certain income should be attributed, and that he (successor counsel) in fact agreed with the position Robertson had put forth to the Department of Revenue (DOR) with regard to that issue. At the time of the phone call with OLR, successor had still not been able to come to an agreement with the DOR on the issue.

By failing to timely turn over the remaining tax files pertaining to the estate, Robertson violated SCR 20:1.16(d), which states, "Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled and refunding any advance payment of fee or expense that has not been earned or incurred. The lawyer may retain papers relating to the client to the extent permitted by other law."

By failing to obey the court's December 8, 2008 order to deliver any remaining files pertaining to the estate to successor counsel within 15 days or to show cause why he should not be punished for his failure to timely comply with successor counsel request to turn over the files, resulting in an Order for Contempt, Robertson violated SCR 20:3.4(c), which states, "A lawyer shall not knowingly disobey an obligation under the rules of a tribunal, except for an open refusal based on an assertion that no valid obligation exists."

Second Matter

In November of 2005, a woman hired Attorney Alan S. Robertson to represent her in her role as special administrator of her husband's estate. The client's husband had died in May of 2005. A Petition for Special Administration was filed on November 8, 2005 and the client was appointed special administrator on November 11, 2005.

The only asset of the estate was an unimproved lot in Colorado. On June 21, 2006, Robertson deposited into his trust account \$13,853.30, representing the proceeds from the sale of the lot.

The client filed her grievance against Robertson in May of 2009, asserting that Robertson had been very slow in closing the estate. CCAP records indicate that no action had been taken on the estate since the summer of 2006, at which time several claims were filed against the estate.

On July 7, 2009, almost a month after being notified that his client had filed a grievance against him¹, Robertson filed a Notice of Motion and Motion for Order Authorizing the Set-Aside of \$10,000.00 to the Surviving Spouse as Exempt From Creditors Under Wisconsin Statute §859.25(1). The Motion was granted on July 13, 2009.

In September of 2009, the court issued a Notice to Close Estate.

On October 15, 2009, Robertson filed a Petition for Extension of Time to Close the Estate until December 15, 2009. The Petition was granted that same day.

On November 30, 2009, Robertson filed an affidavit seeking his client's discharge as special administrator of the estate. He attached thereto an accounting of the estate.

¹ OLR Intake notes indicate that Robertson was made aware of his client's grievance via a phone call on June 9, 2009.

On December 2, 2009, an order was issued discharging Robertson's client as special administrator and the estate was closed.

In correspondence to OLR, Robertson stated:

I personally advanced monies to [my client] when she came to request assistance to pay medical expenses. This disbursement was not related to the estate, except to the extent that her husband left her no funds to support herself. I believe [my client] intends to reimburse me for the funds I have personally advanced.

The amount personally advanced by Robertson was \$549.00. Robertson would later reverse his position regarding reimbursement. In correspondence to OLR, Robertson stated, "Due to her circumstances, I will not press her for repayment of the personal funds I advanced or the billing services in the estate matter."

There is no evidence that the terms governing Robertson's \$549.00 advance were transmitted to his client in writing or that Robertson otherwise complied with the requirements of SCR 20:1.8(a) in connection with that transaction.

Robertson provided canceled checks indicating disbursements for the estate from his trust account as follows:

- \$10,150.00 to his client, in multiple disbursements between September 20, 2006 and October 7, 2008.
- \$550.00 to a retailer and his client² on October 22, 2008
- \$1,222.48 to an auto repair shop in disbursements on November 27, 2007, December 3, 2007, and May 22, 2008.
- \$150.00 to a bank on January 3, 2008.
- \$800.00 to a bonding agency on April 1, 2008.
- \$500.00 to a dentist and his client on January 31, 2008.
- \$800.00 to Robertson's law firm on July 7, 2006.

Later in the investigation, Robertson indicated he had also made the following disbursements from the funds of the estate, although he did not provide canceled checks or the dates of the disbursements:

² It appears that both the check made payable to the retailer and the client and the check made payable to the dentist and the client were deposited into the same account as many of the checks made payable to the client only. The client explained to OLR that neither the retailer nor the dentist would accept a two-party check. There is no indication that Robertson mishandled the checks or the funds represented by the checks.

- \$85.00 small claims filing fee
- \$19.00 service of process
- \$11.00 authenticated copy of Letters of Special Administration
- \$29.30 postmaster
- \$23.29 a Colorado law firm
- \$8.50 Department of Commerce

The disbursements listed in the paragraphs above total \$14,348.57. Robertson had made two deposits totaling \$14,348.30 into his trust account related to the estate: \$13,853.30 from the sale of the lot and \$495.00 in funds which his client had advanced to help defray anticipated expenses and disbursements.

At the time he filed the Motion for Order Authorizing the Set-Aside of \$10,000.00 to the Surviving Spouse as Exempt From Creditors Under Wisconsin Statute §859.25(1) referenced above, Robertson had already disbursed all the assets of the estate, including having disbursed over \$10,000.00 to his client. Robertson did not disclose the disbursements to the court when he filed the Motion, instead stating, “The Estate...has approximately Thirteen Thousand Eight Hundred Thirty Dollars (\$13,830.00) in assets.”

When asked further about the money he had disbursed to his client from the funds of the estate, Robertson explained to OLR, “The [funds distributed to my client were from] the trust account. The source of the funds was the monies deposited to the trust account from the sale of the unimproved lot in Colorado.” Robertson further stated that the funds were to “reimburse her for the claims she paid, such claims including funeral, medical and other estate related expenses.”

Robertson addressed the delay in closing the estate, stating, “I acknowledge that matters perhaps could have proceeded with more dispatch. However, in an effort to protect the interests of my client and attempt to achieve priority status as to her claim, time and effort were required. Since the end result was beneficial to [my client], I believe the time and effort expended was justified. As to why the estate remains open, I can only inform you that I am taking steps to complete the Final Account and close the estate.”

The accounting filed with the court indicated that the following disbursements had been made from the assets of the estate:

- \$2,448.00 to a funeral home

- \$20.00 filing fee
- \$19.00 certified copy of Domiciliary Letters
- \$104.00 filing fee and process of service for a small claims action related to the Estate

- \$960.40 attorneys fee for ancillary administration
- \$1,300.00 attorneys fees to Robertson's law firm
- \$10,000.000 amount allowed to the client

The disbursements listed on the accounting filed with the court total \$14,851.48, approximately \$500.00 more than Robertson actually had on account, and distributed, for the estate.

By failing to take timely steps to advance and close the estate, Robertson violated SCR 20:1.3, which states, "A lawyer shall act with reasonable diligence and promptness in representing a client."

Robertson's advancement of \$549.00 in personal funds to his client was done in a manner that violated SCR 20:1.8(a), which states:

A lawyer shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security or other pecuniary interest adverse to a client unless:

- the transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing in a manner that can be reasonably understood by the client;
- the client is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent legal counsel on the transaction; and
- the client gives informed consent, in a writing signed by the client, to the essential terms of the transaction and the lawyer's role in the transaction, including whether the lawyer is representing the client in the transaction.

By failing to disclose in his Motion for Order Authorizing the Set-Aside of \$10,000.00 to the Surviving Spouse as Exempt From Creditors Under Wisconsin Statute §859.25(1) that he had, in fact, already distributed all funds belonging to the estate, instead representing to the court, "The Estate...*has* approximately Thirteen Thousand Eight Hundred Thirty Dollars (\$13,830.00) in assets," [emphasis added] Robertson violated the following Rules of Professional Conduct:

SCR 20:8.4(c), which states:

It is professional misconduct for a lawyer to engage in conduct involving dishonesty, fraud, deceit or misrepresentation; and

SCR 20:3.3(a)(1), which states:

A lawyer shall not knowingly make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer.

By filing with the court a Final Accounting that did not accurately reflect the disbursements made on behalf of the estate, Robertson violated SCR 20:3.3(a)(1).

Robertson was privately reprimanded in 1995 for neglecting an estate.

In accordance with SCR 22.09(3), Attorney Alan S. Robertson is hereby publicly reprimanded. As a condition of this reprimand, within 30 days of the imposition of the public reprimand, Robertson shall determine and pay any outstanding sanction with regard to the Order for Contempt entered against him in relation to the First Matter.

Dated this 1st day of April, 2011.

SUPREME COURT OF WISCONSIN

/s/
Henry A. Field, Jr., Referee